CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

East'n. District. *Feb.* 1818.

EASTERN DISTRICT, FEBRUARY TERM, 1818.

CHABOT & AL. vs. BLANC.

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APPEAL from the court of the first district.

The petition stated that the plaintiffs are proprietors of certain lots, lying on Levee street, in the city of New-Orleans, which they hold as they were originally granted, with the same boundaries, and subject to the same limitations and restrictions of length and depth, front to the river or quay—that a certain space of ground, lying between their lots, the quay, levee or bank of the river, is a public common, and was thus assured to the original grantees, under whom they claim—that a part of this space was granted by the Baron de Carondelet, and under the

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pretext of this grant, several persons, attempted to improve and build upon it, but these works were abated as a public nuisance, by the corporation of this city, and proceedings were had thereon in the court of the first district, and a judgment rendered, by which the grantee, or those who claim under him, were quieted, in the possession or enjoyment of the said ground or common, in consequence of no defence having been made by the mayor, &c. which judgment is complained of as doing great and manifest injury to the plaintiffs, by depriving them of their several and proper rights—that the defendant had, in consequence of said judgment, again commenced the inclosure of said ground, for the purpose of building thereon, to the injury, damage and total destruction of their fair and equitable title and rights.

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On this petition an injunction was granted, which was afterwards dissolved and the suit dismissed.

The plaintiffs appealed, and the record came up without any statement of facts, or any record of the evidence adduced below.

A bill of exceptions appeared on the record. It was taken to the opinion of the district court, in refusing parol evidence to be given by the

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plaintiffs' counsel to shew, that a grant to Louis Lioteau, was intended and understood at the time, to be in lieu of, and to operate an extinguishment of the grant to Francis Lioteau, under whom the premises are claimed by the defendant.

Besides the error in the bill of exceptions, the plaintiffs alledged the following:

The indistinctness, indeterminateness and insufficiency of the judgment as a final judgment of the cause.

The erroneous legal inferences drawn from the facts, which the judgment itself takes for granted or proven.

Workman, for the plaintiffs. With regard to the admissibility of parol testimony in this case, I refer the court to 1 *Henning and Munford*, 420, 2 *Wilson*, 408, *Powell on contracts*, 420, 1 *Day*, 139, 1 *Johns.* 22, 3 *Johns.* 529, 1 *Term Rep.* 388 and 398, 2 *Evans' Pothier*, *n.* 16, *sec.* 8, *Phillips' law of evidence*, from 410 to 448, and the authorities he there cites.

The error of the district judge, in deciding this point of the cause, has probably arisen from the opinion stated in his judgment, that "none have a right to ask a rescission [of a grant] but those who are parties to it"—whereas

es, in truth, every person is authorized to oppose and ask the rescission of any deed whatever, by which his property or any other right is ceded, or in any wise disposed of, without his consent, or by valid, legal proceedings. The objections of the plaintiffs to the grant under which the defendant claims, and which they would endeavor to support by competent testimony, are these:

1. That the said grant is of a thing which is not in commerce—to wit, of a piece of land which, conformably to the authentic plans of this city, and to uninterrupted usage, ought to be open and free for the use of the public.

2. That the said grant was either not accepted, or, if accepted, was afterwards abandoned and relinquished by the original grantee.

I am well aware of the doctrine of our civil code respecting parol testimony in the case of deeds. "No parol evidence is admissible against or beyond what is contained in the acts." But this rule, I contend, is applicable only to lawful acts, to deeds clothed with every character which the law requires. One of the indispensable requisites of such a deed is, that the thing which is the object of it be a lawful object of commerce. Without this requisite, it is no deed at all. It is, from the beginning,

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null and void. Pothier, in his treatise on obligations, speaking of testimonial proofs, (*Newbern edition*, 232, observes, that "the rejection of testimonial proof against or beside the contents of the instrument, applies only to those who were parties," &c.

The principle that two persons shall not, by any colorable proceedings, affect the consequential rights of a third, may be confidently stated as an invariable rule of law. 2 *Evans' Pothier*, 323.

II. It is abundantly evident, from the first principles of jurisprudence, that a definitive judgment, in order to be valid in law, should be certain, complete, full and conclusive—such a judgment, in a word, as would support the plea, or peremptory exception, of *res judicata*, if a new suit were instituted for the same thing or on the same cause of action: otherwise, there would be no end to litigation. This doctrine requires no argument or authority in its support.

The judgment, in the present case, is null upon this ground. It does not decide the point put in issue by the plaintiffs—to wit, that they have a right to the use or enjoyment of the land or space in front of their homes, as of a com-

mon or public property—and, while the judgment leaves this principal point, the only one of importance in the cause, undecided, it proceeds to determine a point which is not put in issue—a right which is not claimed. This error is founded on a mistake as to the nature of the plaintiffs' demand. The judgment states—"in this case, the petitioners' claim rests upon two grounds—1. that the words in the deed, *face au fleuve*, convey a title to all the intermediate grounds, from the front of their buildings to the river;"—on which it is decided, that "the words *face au fleuve*, are words of description merely, and convey no interest whatever."

The word interest here must, we contend, be construed according to the supposed claim or title to which it refers—namely, a title to all the intermediate ground, &c. a title to which, in fact, the petitioners have laid no claim in their petition. Were the court now to confirm this judgment, would they not thereby pre-judge a most important question, in which many of the riparian proprietors of this commonwealth are deeply interested? Would they not finally decide a point which had not been, and which, in this cause, could not, from the nature of the pleadings, have been argued before them?

This judgment must be pronounced null, on

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the authority of the following law: "The judgment or sentence that is given of or concerning a thing which is not demanded, is not valid." *Part.* 3, 22, 16. Among the instances of this rule is this, to wit—"as if the action be for the property of a thing, and judgment be pronounced for the possession." And so, no doubt, the judgment would be null, if the supposed case were reversed—and so, of course, must the judgment in question be null, inasmuch as it decides on a right of property, which has not been demanded.

Let us hear what Pothier says upon these points—that admirable jurisconsult, whose universally respected decisions are drawn from the sources of our own civil jurisprudence, as well as from the principles of immutable justice. "A judgment," says this author, "is null when the object of the condemnation which it pronounces is uncertain. *Sententia debet esse certa.*" 2 *Pothier on obligations, n.* 18. And farther—"a judgment is null, when it has pronounced upon what has not been demanded; or when it has condemned a party to more than what has been demanded from him; for the judge is appointed only to resolve upon the demands which are brought before him, and he cannot, consequently, render the judgment, ex-

cept upon what is the object of the demand." *Ib. n.* 24.

From the peculiar constitution of our tribunals of the first instance, and the introduction of the mode of trial by jury in civil cases, we may with propriety refer, in such a case as the present, to the common law authorities. The finding of the court below may be considered, in some respects, as if it were the verdict of a jury—But a verdict must "comprehend the whole issue, if it does not, a judgment entered thereon will be erroneous," *Miller* vs. *Tret, Exchequer.* 1 *L. Raymond*—A new trial was granted, the question never having been fully before the jury. *Rex* vs. *Malden*, 4 *Burrows*, 2135.

A verdict was held bad, because it did not find the issue joined. *Brown* vs. *Chare*, 4 *Mass. T. R.* 436.

The supreme court of the United States, decided, in the case of *Patterson* vs. *the United States*, 2 *Wheaton*, 225, that "the rule of law is precise upon this point. A verdict is bad if it varies from the issue in a substantial matter, or if it find only a part of that which is in issue. The reason of the rule is obvious; it results from the nature and end of the pleading. Whether the jury find a general or a spe-

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cial verdict, it is their duty to decide the very point in issue; and although the court, in which the cause is tried, may give form to a general finding, so as to make it harmonize with the issue, yet if it appears to that court, or to the appellate court, that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict."

These decisions are all drawn from the principles of common sense, which I set out with establishing;—namely, that a judgment to be valid, must be certain, full, and decisive.

If it should appear to this honorable court, that the nullity of this judgment has, in any degree, been occasioned by the indistinctness, or want of precision in the plaintiffs' petition, then, I beg leave to suggest, that the cause may be remanded, with instructions to the district judge, to allow the plaintiffs to amend their petition, on such conditions as this court may deem reasonable, such a proceeding would be perfectly conformable to the liberal provision in the 13th section of the act to organize this court, which enables them to give judgment according as the rights of the cause, and the matter in law shall appear. Such a proceeding is also authorized by the practice of the supreme court

of the United States, when deciding on Admiralty causes;—in which the rules of procedure are as liberal as those of our own tribunals—being founded, indeed, upon the same excellent system of jurisprudence.

In the case of the *Brig Caroline* vs. *the United States*, 7 *Cranch*, 500, the supreme court gave the following sentence:

"This cause came on to be heard on the transcript of the record, and was argued by counsel; on consideration whereof, it is the opinion of the court, that the libel is too imperfectly drawn, to found a sentence of condemnation thereon. The sentence of the said circuit court is, therefore reversed, and the cause remanded to the said circuit court, with directions to admit the libel to be amended." The libel in this case did not state any certain specific offence. It was altogether in the alternative; vague, uncertain, and informal. The same point was also decided by the same tribunal, in the cases of the *Enterprize*, the *Purity*, and the *Ann*. 7 *Cranch* 572, 1 *Gallison* 22.

III. The want of the formality of a statement of facts, distinct from the opinion and judgment of the court below, precludes the appellants, according to the rules of this court, from urg-

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ing, with effect, the objection set forth in the last error. This circumstance will, no doubt, furnish an additional inducement to this court, to remand the cause, in order that it may be fully investigated and instructed; and again brought before them, if necessary, in such a manner as will enable them to decide it finally, on its substantial merits, and set the very important question on which it depends, at rest for ever.

Mazureau, for the defendant. We have nothing to do with the authorities cited from *Henning* and *Mumford*, *Willes*, *Powell*, *Day*, *Johnson*, *Evans*, *Phillips*, &c. Every person whose property or rights have been affected by a deed to which he was not a party, has certainly the right of opposing the execution of it, by this old maxim, "*id quod nostrum est, sine facto nostro ad alium transferri non potest*; but I deny him the right of asking the rescission of the deed. The deed, though not binding upon him, is good between the parties, and may forever exist, without depriving him of his rights or property, unless he gives his consent to it—*quod ab initio vitiosum este non potest tractu temporis convalescere.* The judge was, therefore, very correct in that position.

As to the first objection of the plaintiffs to

our grant, I refer the court to the pleadings they will see there—that nothing of the kind was at issue—that the question of a public common was finally decided and settled in the negative, by a solemn judgment of a court of the last resort, rendered between the parties in another suit, and which has acquired the force of *res judicata*.

As to the second, I refer the court to the judgment of the district court, in which they will see that the only object of the oral testimony, which has been rejected, was to shew that "a grant made to Louis Lioteau was intended and so understood at the time to be in lieu and place, and to operate as an extinguishment of the grant made to François Lioteau."

Now, that these facts are incontrovertibly established, I will ask this court if the judge below could admit the evidence offered? Could he do it, when he saw the grant made to François in the hands of his representives? If the grant made to Louis had been made to be in lieu and place, and to operate as an extinguishment of the grant made to François, would not that grant, made to François, have been withdrawn and annihilated? Does not its existence at this time shew, most conclusively, the falsity of the story made by the plaintiffs?

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Could the judge below admit oral testimony, to prove the abandonment or extinguishment of a most solemn and authentic deed, a public grant, when our statute says, "neither shall parol evidence be admitted against or beyond what is contained in the acts, nor on what may have been said before, or at the time of making the said acts, or since." *Civ. Code*, 310, art. 242.

"But," says the counsel for the plaintiffs, "this rule is applicable only to lawful acts, to deeds clothed with every character which the law requires. One of the indispensable requisites of such a deed is, that the thing which is the object of it be a lawful object of commerce." Admit this to be true—who told the plaintiffs' counsel that the grant is not clothed with every character which the law requires? How does he shew that it is not? Is there any such thing in the record? Is it even alledged in the plaintiffs' petition? No.

Again, who told the plaintiffs' counsel that the land, which is the object of our solemn grant, is not a lawful object of commerce? Have not his clients shewn in their petition that a final judgment, rendered between mine and the public, has decided that this land is a private, and not a public property?

What then becomes of the pretended rule of our code?

But, this rule is applicable to all contracts, except those in which fraud is committed against third persons, no matter whether the thing contracted for be in commerce or not—for in both cases written testimony alone can be admitted.

Nothing can be said to belong to a city or corporation, or destined for public use, unless there be a title from the sovereign. The law declares that those things, *que son establecidos e ortogadas para pro communal de cada ciudad o villa &c.* are the only things that belong to the community. *Part.* 3, 28, 9.

II. The judgment decides the only point at issue between the parties. An absolute title to the premises was set up. If the plaintiffs claimed only the use of the property, as a common, why did they begin by asserting that their lots are lying, as they were originally granted to the former proprietors, front to the river or quay? Surely that situation could not give to the plaintiffs any more rights than to all the other inhabitants of the city. A common is given by the sovereign for the benefit of all, without any difference—if, therefore, the property in question was a public common, it was altogether imma-

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terial whether the plaintiffs' lots were situated front to the river or in the back part of the town.

They complain that the attempt to build on the property was made to their great annoyance and injury: if they intended to claim only the use of it as a common, could they with any kind of propriety, use any such language? Did they not know that any man might, with the permission of the sovereign, do what the defendant did, and that nobody could complain of it? *Partida*, 8, 22, 3.

If they intended to claim only the use of the property as a public common, would they have alledged that the judgment rendered against the mayor and aldermen, and quieting the defendant in his possession, had deprived them of their several and proper rights? No—they would have said that it had deprived them of the rights which they had in common with all the citizens.

If they had claimed only the use, as they are now pleased to say, would they have added that the enclosing anew of the property, in consequence of said judgment, was the total destruction of their fair and equitable title and rights? Most undoubtedly not. They knew very well that nobody can say that he has any

title or rights to a thing which has not ceased to be a public common, and that no title is necessary for a resident to make use, jointly with all the others, of a place really common.

What are we then permitted reasonably to infer from all the expressions made use of by the plaintiffs? Why, that they thought that their situation was a title to the ground. No, will their counsel say, because they never cease to call it a public common. Very well—but did they not, at the same time, prove the contrary, by alledging, in their petition, that a judgment had been rendered against the mayor, aldermen and inhabitants of New-Orleans, quieting the defendant in his possession? If they themselves do thus disprove that fact, after having stated it, what do all their allegations amount to? To nothing but a very bold and false assertion of indefinite title and rights to a property which, from their own contradictory shewing, cannot be considered otherwise than a private property.

We ask it with confidence, could the court below consider the action of the plaintiffs as tending merely to obtain only the use of the property as a public common? Is it not more than sufficiently demonstrated by their petition, that

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the question relative to a common, was decided, that there was nothing of the kind?

The question was decided—and, I must be permitted to add, that the plaintiffs themselves, as well as all the other inhabitants of New-Orleans, were parties to the cause in which that decision had taken place. They could not afterwards put it again at issue, either in their own and private names, or in the name of the public. Finally, they could have or claim no right to, or use of the premises, as a common. The question was decided.

They were parties to the cause—witness their petition.

Was it necessary to make them parties to the suit, to sue them separately? No man of common sense can pretend it.

The act to incorporate the city of New-Orleans, passed the 17th of February, 1805, sec. 1st, prescribes, that "all the free, white inhabitants thereof shall be a body corporate, by the name of 'the mayor, aldermen and inhabitants of the city of New-Orleans;' and by that name they, and their successors, shall be known in law, and be capable of suing and being sued, and of defending in all courts, and in all matters whatsoever." It says, sec. 13th, that "the estates, whether real or personal, the rights,

dues, claims or property whatsoever, which heretofore belonged to the city of New-Orleans, or was held for its use by the cabildo, &c. shall be vested in the said mayor, aldermen and inhabitants."

If, therefore, as the plaintiffs themselves state it fully in their petition, the present defendant and appellee has sued the said mayor, aldermen and inhabitants, who had disturbed him in his possession, and caused his fences to be destroyed as a public nuisance, and under pretence that the premises were, what they call, a common or public property—it is evident that the present defendant has sued the only persons whom he could legally sue—the only persons who were exclusively vested by law with every kind of rights to property belonging to, or held for the use of the city of New-Orleans; and the judgment obtained against them is binding against the plaintiffs as well as against all the citizens of New-Orleans. To pretend the contrary, would go to assert that, after having legally silenced, by a solemn judgment, the unfounded claims of a corporation, a party should be obliged to defend his just rights against all the members thereof. The law did certainly not intend any such thing—a doctrine of that kind would be monstrous—if, against the public

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themselves, I have obtained a sentence which declares that a property, claimed by them as public property or common, is my own, I cannot afterwards be called upon by an individual to put the same question at issue.

From these observations it follows that the judge below was bound, by the petitioners' own shewing, to look upon the question as being at rest, could not view their claim otherwise than an assertion of private right to a private property, and was obliged to decide as he did. Could he, since it was shewn by them that the property was not a common, think of their claiming the use of the same as being a common, particularly when in their petition they do not say a word of that pretended right of use? The thing is too absurd: to obtain that use it would have been necessary to shew that the property was a common, and it could not be done. The contrary was decided, and finally settled between all legal parties.

We may, therefore, safely say that, in this respect, there is no error whatever in the judgment of the district court.

But, says the counsel for the plaintiffs and appellants, should it appear that the nullity of this judgment, has in any degree been occasioned by the indistinctness, or want of precision

in the plaintiff's petition, the cause may be remanded.

To this suggestion I answer, there is no nullity in the judgment. The plaintiffs, in their petition, prayed to be maintained in the enjoyment of their legal rights, and that the defendant leave unoccupied the said ground or common.

What did they mean by their legal rights? As they produced no title, the court was bound to presume, that they founded them upon those expressions, said, but not proved, to be in the original grants of their lots, *face au fleuve*, quay or bank of the river.

The court, accordingly, decided that such words, are words of description only, and convey no interest whatever.

To shew the correctness of such a decision, requires but little trouble and reflection.

Let us recollect, that in the very same petition, in which the petitioners state that their lots lay as they were originally granted, *face au fleuve*, or quay, they alledge that there is a space of ground between their lots and the quay, levee or bank of the river, which they say, is a public common.

Now if this be true, and they cannot contradict it, what becomes of the words *face au*

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fleuve? Can those words convey to them any interest in, or to that common? No, admitting therefore that the words *face au fleuve* are inserted in the original grants, which, by the by, is not in evidence, they cannot be considered otherwise than as mere descriptive words; for it cannot be supposed, that the sovereign, by using them, intended to interdict to himself or to the city, the right of disposing of the intermediate ground as he pleased; if such had been the intention of the sovereign, he would certainly, instead of those words, have used the words *face à la commune*, and even in that case, let me be permitted to doubt, that those words would have the effect of preventing the building on the premises; for the thing would not have ceased to be common; if, for example, a church, a market, or a publick hospital had been erected thereon; the rights or interest coming by such words *face á la commune*, would not have been affected, as the same would have continued to be of a public common nature.

The court was therefore right in declaring that those words, in this case, convey no interest whatever upon that intermediate ground, which is said to be a common, and which is proven to be a private property, by the judgment against the mayor, aldermen and inhabitants,

The court, in deciding that those words convey no interest whatever (to that pretended common, as it must necessarily be understood) in dissolving the injunction, at first granted against the defendant, and dismissing the petition with costs, did certainly decide upon the matter in dispute.

No matter what the petitioners claimed or intended to claim, whether the property or the use of it; the court I repeat it, was obliged since they produced no title, to presume that they bottomed their claim on the words *face au fleuve*, which could not be inserted in the petition for nothing; the judgment pronounced that those words convey no interest whatever. The contestation is at rest. No man of sense and impartiality can pretend, that the maxim, *sententia debet esse certa*, is violated. No body can say that the judge decided upon a thing that was not at issue. Every thing is embraced by those expressions; "convey no interest whatever." Every thing is decided by those words, "that the injunction be dissolved, and the petition dismissed."

If the cause was remanded, how could the petition be amended? By striking off the allegations of the former suit between the defendant and the corporation? Very well, but the de-

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fendant would prove it, as well as the judgment that quieted him in his possession. By alledging and asserting clearly and precisely, the pretended right to use the property as a public common? Very well, but the defendant would by producing his judgment, which is a bar against all the inhabitants of New-Orleans, as well as against the plaintiffs, shew that the property is not a public common.

What then would be the result of the remanding of the cause? The parties would be exactly on the same footing as they are now. The only difference would be, that instead of having the most important point of fact, to wit, that the premises are a private and not a public property, alledged by the plaintiffs in their petition, the same would appear in evidence, by the record of the suit, and judgment, alluded to by them in their said petition. Could they destroy that judgment? No, it has acquired the force of *res judicata*, and cannot now be impeached by any man or by virtue of any law. Then, the same decision which has been already given, to wit, a decision against the plaintiffs must again be rendered. The only possible effect of such a proceeding would be to delay the cause, to deprive for several months, the defendant of the free use, possession, and

disposal of his rightful property; and I beg leave to add, that such a proceeding, far from being conformable to the provision of the 18th section of the act to organize this court, would be directly in opposition to the letter, and true sense and spirit of said provision.

I will admit, for the sake of argument only, that the judge below misunderstood the claim of the plaintiffs. What can this court do according to the said provision?

It says "no judgment or decree shall be reversed for any defect or want of form, but the said supreme court shall proceed and give judgment, according as the rights of the cause, and matter of law, shall appear unto them, without regarding any imperfections or want of form in the process or course of proceeding whatsoever."

This court is bound by law, to give judgment according as the rights of the cause and matter of law appear unto them. They must do it without regarding any imperfections in the pleadings—They cannot reverse the judgment appealed from, for any defect or want of form.

I ask it with candour and full confidence, would it not be a direct violation of this law, to remand the cause? Could it be done, with-

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out reversing the judgment? Upon what ground would the cause be remanded? For what motive would the judgment be so reversed? Upon the ground and for the only motive that there is a defect in the judgment, in as much as the court below misunderstood the real claim of the plaintiffs, which claim was imperfectly set forth or established in their petition? I say that this is precisely what the law does not allow this court to do.

This court therefore will, I cannot doubt a one moment, give their final judgment on the merits of the cause.

They will give it in favour of the appellee. They must give it so, on the very face of the plaintiffs' petition.

Let the court consider the claim in either points of view, as a claim to the property, or as a claim to the mere use of it, as a public common.

As a claim to the property, no title is shewn in the record. As a claim to the mere use of the same as a public common, they themselves shew that the property, far from being a public common, has, in a suit before a competent tribunal, between the parties, between the defendant and the mayor, aldermen and inhabitants of the city of New-Orleans, (in which the

plaintiffs are legally included) been finally adjudged, to be the sole and private property of the present appellee; and let us remark, that the plaintiffs in their petition, do not speak of any right of use, view, or passage, on the ground in question, founded on any particular or private title, or otherwise.

Now, if the ground is not a public common, unless they shew a particular or private title of servitude on it, they cannot have any claim; do they shew that title? No, there is nothing of the kind in the record, they do not even alledge it.

There is, there can be no difficulty in deciding this cause upon the record; and if the district court has erred, this court must and will by their judgment, correct the error. But they cannot remand the cause, for the reason assigned by the plaintiffs. They might do it, perhaps, if they were by law confined to pronounce the confirmation, or reversal of the judgment. But the case is different; such judgment as may be deemed just, according as the rights of the cause, and the matter in law shall appear unto them, must be given, without regarding any imperfections or want of form in the process, or course of proceeding whatsoever.

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III. The want of a statement of fact, which by the rules of this court is fatal, is made a ground for remanding the cause. Let me remind the adverse party that, for that very want of a statement of facts, their appeal has been already dismissed once—and let me observe, that if it had not been for the bill of exceptions, (in lieu of which the latter part of the judgment of the court below stands) and for the pretended errors, which they have been permitted to assign and file, every thing would now and long ago be at rest.

MATHEWS, J. delivered the opinion of the court. To have admitted the evidence which the plaintiffs offered, would, in our opinion, have been a violation of the rules of our statute, made for the protection of written covenants, and the security of those who hold property under them, against the uncertainty of testimonial proof. *Civil Code* 340, *art.* 2242. It is contended, on the part of the appellants, that this rule is applicable, only to lawful acts, and not to such as are null and void *ab initio*, on account of the object being *hors de commerce*, &c. This may be true, but cannot be applied to the present bill of exceptions, by which it appears that evidence was offered, not to prove that the

grant to the appellee is void, because it purports to dispose of something, not grantable to their prejudice and injury, but that it is void because something else was granted to some other person, as a consideration for its nullity. To make this circumstance available, against the first grantee, it ought to be shewn that he assented to it, or covenanted to this effect: which would be to shew a contract differing from the written act, which, according to our code, cannot be done by parol evidence, and the judge was correct in rejecting it.

The errors assigned, as apparent on the face of the record, although numerous, may be reduced to two classes. Those relating to the departure of the judgment from the matter in issue between the parties, and those relating to erroneous conclusions in law, drawn by the judge from facts assumed by him, but not appearing in evidence. As to those of the latter class, it is sufficient for us to observe, that this court cannot legally notice the facts in any cause, unless they appear by a statement, or the testimony, as given in the inferior court, which may be sent up with the record. In the present case, the facts are not exhibited to us in either of these forms, and consequently any erroneous opinion of the inferior court, founded

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on facts not appearing in evidence, nor shown as required by law, cannot be corrected: for *de non existentibus & non apparentibus eadem est ratio.*

In order to discover whether any error of the first class does really exist, as stated by the counsel of the plaintiffs and appellants, it is necessary to examine minutely the declarations and complaints in the petition. The answer amounts to a general denial of all the allegations of the plaintiffs, tending to prevent the defendant's enjoyment of the premises. From these allegations, it is believed to be altogether impossible to ascertain what right the plaintiffs claim, or what injury to their property they complain of, as originating in the conduct of the defendant.

They state the lot of ground, on which are the works commenced by the defendants, complained of as an injury to their several and private rights, to a public common.

Considered simply as a public common, without taking into view the relative situation of the property of the plaintiffs, they have no more right or interest in it than any other citizen of the town: and by their own shewing, in the petition, it has been already adjudged by a competent tribunal that it is not a public common—

a judgment having been obtained to quiet the defendant in the possession of it as his private property. It is true that they claim *several and proper rights*; but in no place do they say what those rights are—how they originated—whether they be of property in the thing, or that it should not be granted or appropriated to the separate and unlimited use of any individual, because such a grant or appropriation deteriorates and lessens the value of their houses and lots adjacent thereto, in violation of the good faith, which ought to have been observed to the original grantee; in other words, that it is not grantable as against them, and that the grant is null and void, on account of fraud or mistake; the grantor having made it contrary to some obligation, either express or implied, arising out of the original cession of the lots, held by the plaintiffs and appellants, according to an authentic and established plan of the city.

After having declared the ground, or open space between their lots and the river, to be a public common—after having complained that the judgment obtained by the defendant against the corporation of the city, as set forth in the petition, has deprived them of their several and proper rights, without, in any distinct manner, specifying and designating those rights, the

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plaintiffs finally alledge that "the defendant still persists in making preparations to build on the ground in dispute, notwithstanding their interdiction, to the total destruction of their fair and equitable title and rights?" What title? What rights? Title and rights to the disputed property? No—for they have before told us, that it is a public common. Being a common, they cannot legally claim any private right of property in it—and, considered merely as commoners, their rights have already been decided on, by a competent tribunal.

The circumstance of the district court having decided that the plaintiffs and appellants have no title to the lot occupied by the appellee, is, perhaps, more than ought to have been done; as it does not clearly appear that their right of private property is put in issue, by the pleadings in the case. But this ought not to vitiate the judgment, if it be correct in other respects. It is a judgment, by which the plaintiffs' petition is dismissed—and, in the opinion of this court, properly so, as being so vague and uncertain that no final judgment or decree can be made thereon on the merits of the case.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

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ROGERS vs. SMITH.

ROGERS vs. SMITH.

The power of the special administrator did not extend to the estate of inhabitants of the state, although they had not resided two years in New-Orleans.

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. In a former case, that of *Rogers* vs. *Beiller*, tried before this court in June, 1815, 3 *Martin*, 665, it was questioned whether the office of special administrator of certain vacant estates, created in 1804, by an ordinance of the person then acting as governor-general and intendant of Louisiana, ever had any legal existence; and, if so, whether it stood unrepealed. This court decided both these questions in the affirmative. It is now asked whether the provisions of that ordinance extend to the estates of the citizens of this state, who happen to die in the city of New-Orleans, before having resided there two years.

The expressions of the ordinance are these: "whenever any person, who shall not have resided in this city for more than two years, shall die intestate," &c.

The plaintiff contends, that the words "any person," are so comprehensive, that they exclude the idea of exception, and must inevitably embrace all descriptions of persons, no matter

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from whence they came to the city of New-Orleans. In support of that position, he relies on this general rule, that "whenever a law is clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." *Civ. Code*, 4, *art.* 13.

Surely, if the words "any person," were taken separately, without attending to the sense of the whole law, and to the connection of its different parts, they would be applicable, indiscriminately, to every body. But, when the whole disposition is considered together, they are found to be circumscribed within more narrow limits.

The estate of an individual dying at New-Orleans, before having resided there two years, is to be disposed of according to the ordinance. But, after a residence of two years, what is to be done with it? The answer is, that it shall then be governed by the general laws of the country, the laws which prevail throughout the state, and are enjoyed, as well by the inhabitants of its remotest corner, as by those of its capital. Now, can the citizen of any part of the state lose, even for a moment, the benefit of those laws by coming to New-Orleans? The position is untenable. And will he, after a residence of two years in the city, be restored to

the enjoyment of those laws? This does not seem to admit of serious inquiry.

The ordinance then, though perhaps wanting in explanation, shews itself sufficiently to be intended for persons coming to New-Orleans from abroad, not for the citizens of Louisiana.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, the costs to be supported by the estate.

Morse for the plaintiff, *Moreau* for the defendant.

JOHNSON vs. *DUNCAN & ALS SYNDICS.*

The signature of the endorser must be proven, altho' it was agreed that the note should be received in evidence, so far as it purports to be made by the drawer.

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. This case was first submitted to this court without argument. Judgment was rendered on what appeared to be the only point in controversy. *Ante* 168. A re-hearing having been granted, we will now proceed to examine the questions which have been raised.

The plaintiff and appellee is the bearer of some notes of hand, subscribed by Duncan and

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Jackson, to the order of M'Master and Adams, and endorsed in blank by the payees. The subscribers having failed, the plaintiff demands to be admitted and classed among the creditors of their estate.

The circumstances under which these notes are said to have been delivered to the plaintiff, were mentioned by the defendants as facts formerly disclosed to the court in another case. The identity of the notes, however, not being established, and no evidence having been adduced in the present case to shew that the plaintiff is not the absolute owner of them, the court must disregard those allegations, and treat the plaintiff as the bearer and owner of the notes.

It appears that, on the trial below, the plaintiff contented himself with proving the signature of the subscribers, Duncan and Jackson, and omitted to identify that of the endorsers. It is not disputed that, in a suit against the subscriber of a note of hand, the bearer must prove the signature of the endorser; but the plaintiff thinks that this defect is cured by the admission made by the defendants in the statement of facts, that the notes shall be read in this court. Such admission, if unqualified, would probably cure any defect of proof with respect to the document agreed to be read, it necessarily implying

that the paper thus introduced is considered as legal testimony: but here the defendant has taken care to admit these notes as evidence only so far as they purport to be made and signed by Duncan and Jackson, it being expressly declared in the statement of facts that no other proof than that of the signature of the makers was tendered. In the face of such a declaration, the agreement that the notes shall be read, cannot be construed as admitting not only the signature of the subscribers, but also that of the endorsers.

We must, therefore, say, that the defect of evidence is not cured, and that the plaintiff, having failed to prove the signature of the endorsers of the notes, of which he claims the amount, cannot recover in this action.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that judgment be entered for the defendants, as in a case of non-suit.

Ellery for the plaintiff, *Duncan* for the defendants.

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MORGAN vs. YOUNG & AL.

Morgan vs. Young & al.

APPEAL from the court of the first district.

The vendee, on a *fi' fa'*, is suable, before any recourse to the land sold and mortgaged.

His surety has not the benefit of the plea of discussion.

MARTIN, J. delivered the opinion of the court. This action is brought, in the sheriff's name, on a bond given by one of the defendants as principal, and the other as a surety, on the purchase by the principal of a tract of land, sold on an execution. The first part of the bond, is in the ordinary form, of the penal part of an English bond, in which the parties bind themselves, jointly and severally, in the sum of $730, for which the premises were sold, and as usual, for double the sum. The second part is in the form of the condition of an English bond, it recites the sale of the premises under the execution, the adjudication of them to the vendee, and concludes with the condition usual in English bonds, that on the payment of the purchase money, the bond will be null and void.

The answer avers, that the defendants are not indebted to the plaintiff, because one of them, Young, the principal in the bond, is a creditor of one of the persons, for whose interest the suit is brought, for the sum of $217, for which he has, at the time of the answer, a suit de-

pending in the court he is sued in—that he is a creditor of another of the persons, for whose interest the suit is brought, for the sum of $280, for professional services—and that he is ready to pay the balance.

The district court dismissed the suit, being of opinion, that "the sheriff must, first resort to the mortgaged premises, (the land sold under the execution) and in case that should be insufficient, then the estate of the purchaser, as well as that of his surety in the bond, is bound; the decree then would be, that the mortgaged property, be first sold, and in case it should not be sufficient to make the money, then for the balance, execution should go, against the estate of the purchaser and his surety—the surety is only liable in the event, that the mortgaged property should be insufficient: it must be first discussed."

From this judgment, the plaintiff appealed. The statement of facts, admits the execution of the bond, and an amicable demand.

The case has been submitted to this court, without any argument.

The allegations of the petition are not denied by the defendants, and the facts alledged in the answer are not proven.

The defendant Young, the principal obligor,

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bound himself personally to pay the $730, the price at which the land had been adjudicated to him: and although according to the act of 1808, 15, he gave a mortgage and surety; we are unable to discover, on what grounds the district court assumed the position, that the land ought to be first resorted to, and that the purchaser was not to be personally attacked, till the land proved insufficient to pay the debt.

The other defendant, who bound himself in *solido* with the vendee, appears to us to be also liable to a suit immediately. *Civil Code* 430, *art.* 7. Admitting that he had a right to demand a discussion of the mortgaged premises, or any other property of the principal debtor, yet as he did not require it, the plaintiff was entitled to judgment. The creditor is not bound to discuss the principal debtor's property, unless he should be required so to do, by the surety. *Civil Code* 430, *art.* 8.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed: and proceeding to give such a judgment, as in our opinion, ought to have been given in the district court, we order, adjudge and decree, that the plaintiff and appellant, do recover from the

defendants, the sum of seven hundred and thirty dollars, with legal interest, from the fourth day of September 1816, until paid, with costs in both courts.

Hennen for the plaintiff, *Young* for the defendants.

PIERCE vs. *GRAYS & AL.*

In Spain, a donation to an infant, of slaves delivered to the donee's father, is irrevocable, although he does not formally accept the gift.

APPEAL from the court of the third district.

MATHEWS, J. delivered the opinion of the court. The plaintiff and appellant, claims two slaves from the defendants. On the 17th of August, 1809, he purchased from Philip A. Gray, father of the defendants, eighteen slaves, and among them, the two now claimed, as having always remained in the possession of the vendor, or his heirs. On the next day, he executed a deed of gift, in favor of Mayo Gray, and Sarah A. Gray, infant children of the vendor, for said slaves. The property remained in this situation, till the 17th of September, 1814, when the donor, seems to have changed his benevolent intention towards the donees, and declared before the judge of the parish of Feli-

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ciana, his will and desire to revoke and annul "the deed of gift executed by him, in the year 1809, before Wm. Lewis, Syndic of the district of Feliciana, then under the government of Spain."

The fact of the written donation, executed by the plaintiff, appears so conclusively, by the introduction of the instrument, intended as a revocation of the donation, that it is thought unnecessary, to notice the bill of exceptions of the defendants, on the introduction of parol evidence, to prove the acknowledgment of the plaintiff to that effect.

The only question of law, which arises out of these facts, is whether the donation was perfect and irrevocable, without any formal acceptance, for the infants by their father, or some other person.

According to the rules laid down, on the subject of donations, *inter vivos*, it is clear, that the donor is bound, only from the acceptance of the donation, in precise terms; and that it produces no effect, except from the day of the acceptance. *Civ. Code* 220, *art.* 54. Were the case to be decided by these rules, it is probable, that the judgment of the district court, would prove to be an erroneous one. But we are of opinion, that our code, does not proper-

ly exhibit the rules, by which the point in dispute between the parties, must be settled.

The contract, was made under the Spanish government, and the municipal laws of Spain, are alone applicable to it. These, it is believed, are not so rigorous as our statute, in requiring a formal acceptance, in order to give validity to a donation, or to render it perfect and irrevocable; except in the cases laid down as ingratitude, a change of situation in the donor, who has given the greatest part of his estate, the subsequent birth of children &c. which apply to donations, complete as to form.

Gomez, in his *Variæ resolutiones*, lays it down, on the subject of donations, that they are executed in two modes: by delivery or promise. By delivery, *quando nullâ precedente promissione vel obligatione quis tradit suam rem alteri causâ donationis; quia tunc statim valet & perficitur donatio; et transit dominium & plenum jus rei, in accipientem, ex titulo & causâ donationis.* A donation by promise, is when a person obliges himself to give or deliver something to another. If a donation, accompanied by the delivery of the thing, be complete and perfect, it follows, as a necessary consequence, that it ought to be considered as irrevocable, on

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the part of the donor, unless for causes authorized by law.

The donation made by the plaintiff and appellant was not accompanied by any formal delivery of the slaves given to the appellees, or any person for them; but they were left in the possession of their father, who held them before the execution of the deed of gift to his infant children. He was the proper person to have received the donation for them; and having already the possession of the slaves, no formal delivery was necessary to transfer the dominion of them in full right to the donees. We consider the slaves as having been in the possession of the father, under the donation to his children, and held for them, from the time of the execution of the deed of gift, to the commencement of this action. Was a formal, written acceptance of the donation necessary, on the part of the donees, under these circumstances, to render it irrevocable by the donor? The court is of opinion, that it was not. It is very doubtful whether, by the laws of Spain, a formal acceptance be necessary in any case, where the delivery of the thing accompanies the donation. But in cases of minors, infants and absent persons, no acceptance is necessary to render the donation irrevocable, according to Gomez.

Treatise on Donations, n. 8. It is true, that in a donation to an absent person, it seems required that the title or deed be transferred to the donee, in order to render the donation irrevocable; or that a clause be introduced, by which the notary or officer before whom it is made, be requested by the donor to accept it for the absent person, and that he then takes it as if accepted in due form. *Febrero*, 1, 5, *n.* 19. These regulations are confined to absent persons; and we find in the same books, *n.* 30, that a donor cannot revoke a donation, made in such a manner so as to substitute a third person to the donee, when the substitute is an infant.

From this view of the case, we are of opinion, that the judgment of the district court is correct.

It is, therefore, ordered, adjudged and decreed, that it be affirmed, with costs.

Turner for the plaintiff, *Baldwin* for the defendants.